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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WEI M. LEE,

Petitioner,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Commissioner of Social Security Administration has been empowered by Congress to mandate the date of birth of a naturalized citizen.

2. Whether the Commissioner of Social Security Administration may disregard the birth certificate of a naturalized citizen without evidence that it is not valid or not recorded within five years of birth.

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (App. 1) is not reported No. 99-55048. The order of the Ninth Circuit denying petitioner's request for rehearing and request for rehearing en banc (App. 23) is not reported. The judgment of the District Court in and for the Central District of California (App. 3) is not reported.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was entered on June 20, 2000. The Ninth Circuit entered an order denying Petitioner Lee's timely petition for rehearing and petition for rehearing en banc on September 6, 2000.

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Regulations 404.715 and 404.716 of the Code of Federal Regulations, Title 20 ("20 CFR") which specifies the type of evidence of age a claimant must produce when he applies for Social Security benefits.

Regulation 404.715 entitled *When evidence of age is needed* states

(a) if you apply for benefits, we will ask for evidence of age which shows your date of birth. . . .

Regulation 404.716 entitled "Type of evidence of age to be given" provides

(a) Preferred evidence. The best evidence of your age, if you can obtain it, is either a birth certificate or hospital birth record recorded before age 5, or a religious record which shows your date of birth and was recorded before age 5.

(b) Other evidence of age. If you cannot obtain the preferred evidence of your age, you will be asked for other convincing evidence that shows your date of birth or age at a certain time such as: an original family bible or family record; school records; census records; a statement signed by the physician or midwife who was present at your birth; insurance policies; a marriage record; a passport; an employment record; a delayed birth certificate, your child's birth certificate; or an immigration or naturalization record.

STATEMENT OF THE CASE

Appellant brought this action pursuant to Section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)) for judicial review of the final decision of the Commissioner of Social Security Administration finding that Appellant's date of birth was October 3, 1931 and not October 3, 1923 as shown on the birth certificate from the

province of his birth, which document was secured and used in his application for United States citizenship.

Appellant Lee applied for Retirement Insurance benefits January 15, 1993 stating date of birth was October 3, 1923. The Administration determined his date of birth was October 3, 1931 (A.R. 77). Lee filed a Request for Reconsideration which was denied August 12, 1993 (A.R. 84). Lee reapplied for Retirement Insurance benefits on October 5, 1994 (A.R. 96) and following denial requested reconsideration. The request for reconsideration was denied. Lee filed Request for Hearing on March 1, 1995 (A.R. 125). On July 1, 1995 Administrative Law Judge Richard A. Urbin dismissed the Request for Hearing finding that the Request for Hearing involved the same facts and issues which were decided in the final and binding reconsidered determination dated August 12, 1993 made on claimant's prior application of January 15, 1993 (A.R. 130). The matter was timely appealed to the Appeals Council (A.R. 132). Following submission of Brief on Appeal (A.R. 140-145) the Appeals Council remanded the case on June 11, 1996 for a hearing on the merits of the case (A.R. 146-148). Following hearing on August 15, 1996 at which only Lee testified through an interpreter the Administrative Law Judge ("ALJ") issued a decision on September 27, 1996 finding Lee was born on October 3, 1931 (A.R. 15, 22). The matter was timely appealed to the Appeals Council. Lee submitted a brief in support of his position that he was born on October 3, 1923 (A.R. 158-160). On January 21, 1998 the Appeals Council issued an unfavorable decision finding Lee was born on October 3, 1931 (A.R. 4-12).

On February 17, 1998 Lee timely appealed the matter to United States District Court, Central District of California. Following submission of Motion for Summary Judgment by parties United States Magistrate Judge Andrew J. Wistrich issued Notice of Filing of Magistrate Judge's Report and Recommendation and Lodging of Proposed Judgment and/or Order on October 30, 1998 recommending that Defendant's Motion for Summary Judgment be granted. On November 9, 1998 Plaintiffs filed Objections to the United States Magistrate Judge's Report and Recommendation and Proposed Judgment. On November 16, 1998 United States District Judge Dickran Tevrizian granted judgment for Defendant. On November 24, 1998 the matter was timely appealed to United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE FACTS

Appellant Lee was born in the province of Guangdong, Taishan County, Deforg Township, Daihong Village, China (A.R. 84). In 1949 he left China with his wife and one-year-old child for Hong Kong. He testified at hearing that he told the government clerk in Hong Kong that he was born in Chang Kai Shek year 12, which would be year 23 in the western calendar. The government clerk made an error and wrote Chang Kai Shek year 20 which translates to year 31 in the western calendar. Lee emigrated to the United States in 1969 and worked in the United States until January 1993.

In 1987 Lee wanted to apply for United States citizenship. He wrote to his village in China and asked for

certification of his birth date. When he presented this certificate to the attorney who was handling his naturalization matter, the attorney told him that the United States District Court would only accept verification of date of birth from the province of birth in China. The birth certificate certifying his date of birth as October 3, 1923 was received from the province of Guangdong, his province of birth in China, in 1991 and was accepted by United States District Court, Central District of California. Lee took the test for United States citizenship in Chinese and became a naturalized citizen on September 25, 1992 (A.R. 72).

Lee testified at hearing on August 15, 1996 that he was born on October 3, Chinese year 12 (A.R. 39). In America one adds eleven (11) years to the Chinese year which would make it 1923 (A.R. 39). When he went to Hong Kong he gave the government clerk the current year of birth. He did not correct the mistake of the government clerk because in Hong Kong it is very difficult to change something legally (A.R. 39). In Hong Kong the government people are always right. The government clerk was sitting up high at a desk and the stand came to Lee's chin. He couldn't see what the clerk was writing (A.R. 40). When he came to the United States on October 30, 1969 he used the Hong Kong identification (A.R. 40). He applied for United States citizenship in 1992. He wanted the correct date of birth on his naturalization papers (A.R. 41). He stopped working in January 1993. He never studied English. The law in America states that you can take the test for citizenship in your own language if you have lived in the United States for twenty (20) years (A.R. 44). He renewed his driver's license by

mail in 1993. He didn't know he could correct his date of birth on the license (A.R. 50). He considers his citizenship document very important and wanted his correct date of birth on it (A.R. 52).

Following hearing on August 15, 1996 the Administrative Law Judge filed decision finding date of birth was October 3, 1931 and claimant had attained age 62 on October 3, 1993 (A.R. 22). Following timely appeal the Appeals Council on January 21, 1998 found Lee was born on October 3, 1931 (A.R. 12).

On February 17, 1998 a complaint was filed in United States District Court, Central District of California. Parties submitted Motion for Summary Judgment. On October 30, 1998 United States Magistrate Judge Andrew J. Wistrich filed Magistrate Judge's Report and Recommendation and Lodging of Proposed Judgment and/or Order recommending Defendant's Motion for Summary Judgment is granted. Plaintiff filed Objections to United States Magistrate Judge's Report and Recommendation and Proposed Judgment on November 9, 1998. On November 16, 1998 the United States District Court adopted the findings of fact and conclusion of law of United States Magistrate Judge and affirmed Defendant's decision.

On November 24, 1998 a timely appeal was filed in United States Court of Appeals for the Ninth Circuit.

ARGUMENT

I. The Commissioner of Social Security Administration Must Determine The Birthdate of a Naturalized Citizen Based on Substantial Evidence In the Record

Regulation 404.716 of the Code of Federal Regulations, Title 20 ("20 CFR") provides that the best evidence of age is either a birth certificate or hospital record recorded before age five (5) and if the preferred evidence cannot be obtained then other convincing evidence such as a naturalization record which shows the date of birth will be considered.

Petitioner Lee was born in the province of Guangdong, Taishan County, Deforg Township, Daihong village in China. In 1949 he left China with his wife and one-year-old child for Hong Kong. He testified at hearing that he told the government clerk in Hong Kong that he was born in Chang Kai Shek year 12 which would be year 23 in the western calendar. The government clerk made an error and wrote down Chang Kai Shek year 20 which translates to year 31 in the western calendar, Lee emigrated to the United States in 1969 and worked in the United States until January 1993.

In 1987 Lee wanted to apply for United States citizenship. He wrote to his family in his village in China and asked for a certificate of birth. His attorney who was handling his citizenship case told him that the United States District Court would only accept verification of date of birth from the province of birth in China. The birth certificate certifying his date of birth as October 3, 1923 was received from the province of Guangdong, his province of birth in China, in 1991 and was accepted by

United States District Court, Central District of California, and the Superior Court of Los Angeles. Lee took the test for United States citizenship in Chinese as he was over sixty (60) years of age and had resided in the United States for twenty (20) years. He became a naturalized citizen on September 25, 1992.

Lee applied for Social Security Retirement Benefits on January 15, 1993 stating his date of birth was October 3, 1923. The Administration determined his date of birth was October 3, 1931. Lee testified at the administrative hearing he did not correct the mistake of the government clerk in Hong Kong who had written down his year of birth was Chang Kai Shek year 20 instead of Chang Kai Shek year 12 because in Hong Kong it was very difficult to change something legally. When he came to the United States he used the Hong Kong identification. When asked why he didn't correct his date of birth on his driver's license Lee testified he received the renewal of his driver's license by mail and didn't know he could correct his date of birth. Lee never studied English and required an interpreter at hearing.

The United States District Court, Central District of California, found the following evidence relevant to resolution of Lee's date of birth: (a) INS verification report, dated October 30, 1969, reflecting plaintiff's date of birth as October 3, 1931; (b) printout of identifying information given in connection with application for social security number, dated October, 1969, reflecting plaintiff's date of birth as October 3, 1931; (c) California driver license, dated September 17, 1981, reflecting plaintiff's date of birth as October 3, 1931; (d) delayed birth certificate from China, dated October 27, 1987, reflecting plaintiff's date

of birth as October 3, 1923; (e) Chinese notarial birth certificate, dated September 24, 1991, reflecting plaintiff's date of birth as October 3, 1923; (f) certificate of naturalization, dated September 25, 1992, reflecting plaintiff's date of birth as October 3, 1923; (g) California driver license, dated September 8, 1993, reflecting plaintiff's date of birth as October 3, 1931; (h) plaintiff's testimony regarding his date of birth, reflecting plaintiff's date of birth as October 3, 1923; and (i) the statements of plaintiff's in-laws, dated October 25, 1993, reflecting plaintiff's date of birth as October 3, 1923.

Lee testified that the government clerk in Hong Kong put down the wrong year of birth and he did not correct it because it was difficult to change anything legally in Hong Kong. He used the Hong Kong identification when he emigrated to the United States. He did not correct the date of birth on the documents because he did not know he could do that. He does not communicate in English. When it came time for applying for United States Citizenship he wanted his correct date of birth on his naturalization documents as he was proud to be an American citizen.

The birth certificate received from China, dated October 27, 1987, and the notarial certificate received from Guangdong Province, the People's Republic of China, dated September 24, 1991, state that Lee's date of birth is October 3, 1923. These dates are not the dates of recording of the birth certificate but dates when the birth certificate was secured from government records and sent to Lee. Respondent appears to be mischaracterizing these dates as dates of recordation of the birth – they are dates when the birth certificate was secured from government

records and sent to Lee. Respondent's use of the words "delayed birth certificate" would appear an attempt to confuse the issue. The birth certificate from China is not a delayed birth certificate as it was recorded following birth but is a certificate sent later in 1987 and 1991 to Lee at his request when it was retrieved from government records. On July 7, 2000 a representative at the office of the Consulate General of the People's Republic of China, located at 443 Shatto Place, Los Angeles, California, 90020, informed counsel that births in China are recorded immediately after birth and this was true in 1923.

In its Memorandum the United States Court of Appeals for the Ninth Circuit cited from *Hermes v. Secretary of HHS*, 926 F.2d 789 (9th Cir. 1991) as did the United States District Court, Central District of California. This case would not appear relevant or on point. In *Hermes* the Court reported religious records from all sources within Iraq are highly suspect. Lee's birth certificate is not a religious record but a governmental record. Respondent has produced no evidence that the birth certificate from China is not valid and was not recorded in China before age five (5).

Lee's in-laws submitted a statement certifying that his date of birth is October 3, 1923. The United States District Court, Central District of California, in granting summary judgment to respondent stated that statement of Lee's in-laws does not establish that they possessed personal knowledge regarding the date of Lee's birth. On the contrary Lee married their daughter and they have personal knowledge of his date of birth which is required on a marriage certificate in the United States and China. Based on *Dodrill v. Shalala*, 12 F.3d 915 (9th Cir. 1993) this

evidence which declares that the in-laws knew his date of birth is relevant and disregarding this evidence violates the Secretary's regulation requiring consideration of observations of family members. This must be determined legal prejudicial error.

In *Benitez v. Califano*, 573 F.2d 653 (9th Cir. 1978) the Court stated the Social Security Act is remedial and is to be construed liberally. In *Hormel v. Helvering*, 61 S.Ct. 721 (1941) this Court stated Rules of Procedure and Practice are devised to promote the ends of justice, not to defeat them. A rigidly and undeviating judicially declared practice would be out of harmony with this policy. Orderly Rules of Procedure do not require sacrifice of the rules of fundamental justice. Rules of fundamental justice require that Lee's date of birth be declared as October 3, 1923 as stated in his birth certificate from Guangdong Province in China and accepted as valid by United States District Court, Central District of California. The representative at the office of the Consulate General of the People's Republic of China in Los Angeles informed counsel that births in China are recorded immediately after birth and this was true in 1923. Therefore Lee's birth certificate is a valid document and recorded in China immediately following his birth. Lee has complied with Regulation 404.716 of 20 CFR in that he has submitted from China a valid birth certificate recorded before age five (5) certifying his date of birth as October 3, 1923.

Respondent has produced *no* (emphasis added) evidence that the birth certificate is not valid and was not recorded before age five (5) in China. Lee's date of birth must be certified/found to be October 3, 1923.

II. The Commissioner of Social Security Administration has not been empowered by Congress to arbitrarily determine the date of birth of a naturalized citizen

In *Richardson v. Perales*, 402 U.S. 389, 401 91 S.Ct. 1420, 1427 L.Ed.2d 842 (1971) this Court stated that substantial evidence is more than a mere scintilla but less than a preponderance and substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." The United States Naturalization Certificate shows date of birth as October 3, 1923 and is based on an actual birth certificate received from Guangdong Province in China. A reasonable mind would accept as adequate Lee's date of birth as October 3, 1923 as it is supported by a birth certificate which is the document recognized world-wide as evidence of the actual birthdate.

The United States District Court, Central District of California, which affirmed summary judgment in favor of the Commissioner of Social Security Administration is the *same court* (emphasis added) which accepted the birth certificate from Guangdong Province in China as a required document prior to Lee's being found eligible for United States Citizenship and accepted and certified Lee's date of birth as October 3, 1923. This Court, Central District of California, must be consistent in its findings relating to the same individual. Other documents referred to by Respondent as showing a date of birth as October 3, 1931 are not supported by a birth certificate. The birth certificate from Guangdong Province in China states a fact and an actuality – Lee was born on October 3, 1923.

Birth is a fact and an actuality of life. Substantial evidence in the record establishes that Lee's date of birth is October 3, 1923. Lee has now passed his seventy-seventh (77) birthday. His date of birth must be certified as October 3, 1923 as did the United States District Court, Central District of California, when he was granted United States citizenship.

CONCLUSION

This case presents an important issue on determination of age in Social Security cases where a claimant was born in another country and his birth certificate is not produced until many years after claimant has resided in the United States. In Lee's case there would appear to be a violation of the due process rights of this American citizen. He has carried his burden of proof of age by submitting a birth certificate from Guangdong Province in China. Respondent has not produced any evidence that the birth certificate is not valid and was not recorded in China prior to age five (5). Other countries accept as valid a birth certificate from the United States when no irregularities have been shown. The United States must accord the same courtesy to the citizens of China who emigrate to the United States and present a birth certificate from China which is properly notarized. Congress did not grant the Social Security Administration the right to state what an individual's birthdate is in the face of a valid birth certificate which has not been found suspect. This Court is a naturalized citizen's last resort to prevent an agency of the United States government from overturning a valid birth certificate which sets forth a date of birth of

October 3, 1923. The Social Security Administration must not be permitted to state Lee's date of birth is not October 3, 1923. Petitioner Lee respectfully requests that this Court grant Certiorari to review this important issue.

Respectfully submitted,

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APPENDIX

Not for Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WEI M. LEE, Plaintiff-Appellant, v. **KENNETH S. APFEL, Commissioner of Social Security Administration,** Defendant-Appellee.	No. 99-55048 D.C. No. CV-98-01110-DT(AJW) **MEMORANDUM*** (Filed Jun. 20, 2000)

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Submitted June 9, 2000**
Pasadena, California

Before: **KOZINSKI, T.G. NELSON** and **WARDLAW**, Circuit Judges.

The Commissioner's final decision that Lee's date of birth is October 3, 1931, is supported by substantial evidence and free of legal error. *See Sandgathe v. Chater*, 108

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

F.3d 978, 980 (9th Cir. 1997). The ALJ and Appeals Council did not err by giving greater weight to the earliest recorded documents. *See Hermes v. Secretary of HHS*, 926 F.2d 789, 791 (9th Cir. 1991). The record contains no "preferred evidence" of Lee's date of birth, as Lee failed to present documents recorded within five years of birth. *See* 20 C.F.R. § 404.716(a) (1999) ("The best evidence of your age, if you can obtain it, is either: a birth certificate or hospital birth record recorded before age 5; or a religious record which shows your date of birth and was recorded before age 5."). Moreover, the ALJ was entitled to discount Lee's testimony, which was inconsistent with an earlier statement. *See Nyman v. Heckler*, 779 F.2d 528, 531 (9th Cir. 1985) ("An ALJ's assessment [of credibility] should be given great weight.").

Finally, Lee's claim that we must defer to the date of birth reflected on his 1992 naturalization certificate is without merit. Not only is the certificate a recently created document, but Lee's date of birth was not a determining factor in the naturalization proceeding.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

WEI M. LEE, Plaintiff, v. KENNETH S. APFEL, Commissioner of Social Services, Defendant.	)	No. CV98-1110-DT (AJW) JUDGMENT (Filed Nov. 13, 1998)

IT IS ADJUDGED that judgment is entered affirming defendant's decision denying benefits.

DATED: 11-12-98

/s/ Dickran Tevrizian
DICKRAN TEVRIZIAN
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

WEI M. LEE, Plaintiff, vs. KENNETH S. APFEL, Commissioner of Social Security Administration, Defendant.	No. CV98-1110-DT (AJW) ORDER ADOPTING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE (Filed Nov. 13, 1998)

Pursuant to 28 U.S.C. § (b) (1) (C), the Court has reviewed the entire record in this action, the Report and Recommendation of the United States Magistrate Judge ("Report"), and the objections thereto. The Court concurs with and adopts the findings of fact and conclusions of law of the Report after having made a *de novo* determination of the portions to which objections were directed.

IT IS HEREBY ORDERED that judgment be entered affirming defendant's decision denying benefits.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of the Order Adopting Report and Recommendation and Judgment by United States mail on counsel of record.

DATED: 11-12-98

/s/ Dickran Tevrizian
DICKRAN TEVRIZIAN
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

WEI M. LEE,	)	
Plaintiff,	)	**No. CV98-1110-DT (AJW)**
v.	)	**REPORT AND RECOMMENDATION[1] OF MAGISTRATE JUDGE**
KENNETH S. APFEL, Commissioner of Social Security Administration,	)	(Filed Oct. 30, 1998)
Defendant.	)	

Plaintiff filed this action seeking reversal of the decision of defendant regarding plaintiff's application for retirement insurance benefits. *See* Section 202(a) of the Social Security Act, 42 U.S.C. § 402(a). The parties have filed cross-motions for summary judgment.

The sole issue presented by this case is: when was plaintiff born? Plaintiff contends that he was born on October 3, 1923. Defendant determined that plaintiff was born on October 3, 1931. Because defendant's determination is supported by substantial evidence in the record, defendant's determination should be affirmed.

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[1] This report and recommendation is issued pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

Administrative Proceedings

Plaintiff filed two applications for retirement insurance benefits, one on January 15, 1993, and one on October 5, 1994. [Administrative Record ("AR") 59-62, 96-98]. No purpose would be served by recounting in detail the course of the administrative proceedings regarding those applications. Suffice it to say that both of plaintiff's applications were denied and the issue of plaintiff's date of birth was eventually set for hearing on August 15, 1996 before Administrative Law Judge ("ALJ") Richard A. Urbin. Plaintiff was represented by an attorney and assisted by an interpreter during the hearing. [AR 31].

The ALJ issued his decision on June 27, 1997. [AR 18-22]. He determined that plaintiff was born on October 3, 1931, that plaintiff attained age 62 (and consequently became eligible for retirement insurance benefits) on October 3, 1993, and that plaintiff had applied for retirement insurance benefits on October 5, 1994. [AR 22]. The ALJ, however, failed to note that there was a protective filing date of September 26, 1994. [*See* AR 8 n.1]. In reaching his decision, the ALJ discussed, among other things, six pieces of documentary evidence, plaintiff's previous statements, plaintiff's testimony, and the statements of plaintiff's mother-in-law and father-in-law. [AR 19-22].

The Appeals Council granted plaintiff's request for review. It issued its decision on January 21, 1998. [AR 6-12]. The Appeals Council determined that the evidence of highest probative value supports a finding that plaintiff was born on October 3, 1931. [AR 7, 11-12]. The Appeals Council, however, concluded that the plaintiff

was entitled to retirement insurance benefits based on the application filed on January 15, 1993, effective November, 1993, rather than based on the application dated October 5, 1994. [AR 7, 11-12].

Standard of Review

Defendant's denial of benefit should be disturbed only if it is not supported by substantial evidence or if it is based on the application of incorrect legal standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995); *Flaten v. Secretary of Health and Human Services*, 44 F.3d 1453, 1457 (9th Cir. 1995). Substantial evidence is more than a mere scintilla but less than a preponderance. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Moncada*, 60 F.3d at 523. Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson*, 402 U.S. at 401, quoting *Consolidated Edison Co. V. N.L.R.B.*, 305 U.S. 197, 229 (1938). The Court is required to review the record as a whole, and to consider evidence detracting from the decision as well as evidence supporting the decision. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995); *Hammock v. Bowen*, 879 F.2d 498, 501 (9th Cir. 1989). "Where evidence is susceptible to more than one rational interpretation, the decision of the ALJ must be upheld." *Moncada*, 60 F.3d at 523.

Discussion

Section 404.716 of defendant's regulations, which concerns the determination of age, provides:

> "(a) *Preferred evidence.* The best evidence of your age, if you can obtain it, is either: a birth certificate or

hospital birth record recorded before age 5; or a religious record which shows your date of birth and was recorded before age 5.

(b) *Other evidence of age.* If you cannot obtain the preferred evidence of your age, you will be asked for other convincing evidence that shows your date of birth or age at a certain time such as: an original family bible or family record; school records; census record; a statement signed by the physician of mid-wife who was present at your birth; insurance policies; a marriage record; a passport; an employment record; a delayed birth certificate; your child's birth certificate; or an immigration or naturalization record."

20 C.F.R. § 404.716.

The record contains the following evidence relevant to resolution of plaintiff's date of birth: (a) INS verification report, dated October 30, 1969, reflecting plaintiff's date of birth as October 3, 1931 [AR 109]; (b) printout of identifying information given in connection with application for social security number, dated October, 1969, reflecting plaintiff's date of birth as October 3, 1931 [AR 81]; (c) California driver license, dated September 17, 1981, reflecting plaintiff's date of birth as October 3, 1931 [AR 63]; (d) delayed birth certificate from China, dated October 27, 1987, reflecting plaintiff's date of birth as October 3, 1923 [AR 154]; (e) Chinese notarial birth certificate, dated September 24, 1991, reflecting plaintiff's date of birth as October 3, 1923 [AR 99-105]; (f) certificate of naturalization, dated September 25, 1992, reflecting plaintiff's date of birth as October 3, 1923 [AR 107]; (g) California driver license, dated September 8, 1993, reflecting plaintiff's date of birth as October 3, 1931. [AR 48-50,

153]; (h) plaintiff's testimony regarding his date of birth, reflecting plaintiff's date of birth as October 3, 1923 [AR 39]; and (i) the statements of plaintiff's in-laws, dated October 25, 1993 reflecting plaintiff's date of birth as October 3, 1923 [AR 91-92].

Documents which were not recorded within five years of plaintiff's birth do not qualify as preferred evidence. 20 C.F.R. § 404.716; *see Hermes v. Secretary of Health and Human Services*, 926 F.2d 789, 791 (9th Cir.), *cert. denied*, 502 U.S. 817 (1991). None of the documents in the record were recorded within five years of plaintiff's birth. Although plaintiff contends that items (d) and (e) were recorded earlier than October 27, 1987 and September 24, 1991, there is no evidence in the record reflecting an earlier date. Plaintiff, of course, bears the burden of persuasion on all issues of fact. *See*, 20 C.F.R. §§ 404.703-705; *see generally Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 577 (9th Cir. 1988).

The documentary evidence regarding plaintiff's date of birth obviously conflicts. Some documents reflect a birth date of 1931, while other reflect a birth date of 1923. Defendant did not err in choosing to accord greater weight to documents recorded earlier. *See Hermes*, 926 F.2d at 792 ("The ALJ and the Secretary were clearly entitled to accord greater weight to the documentation that was recorded many years earlier. . . . "); Social Security ruling 75-14a; *see also* 20 C.F.R. § 404.708(d). Defendant was not required, pursuant to its own regulations or any other principle of law, to give priority to one

or more of the documents over the others.[2] Therefore, insofar as the conflict among the documents was concerned, the conflict was one that it is within the province of defendant to resolve, and substantial evidence would support a decision either way. *See Hermes*, 926 F.2d at 792.

Defendant also was entitled to discount the credibility of plaintiff's testimony regarding his date of birth. Plaintiff had previously represented to state, federal, and foreign government authorities that he was born on October 3, 1931. [*See* AR 63, 81, 90, 153]. The fact that plaintiff applied for a social security number in 1969 and a driver's license in 1981 and 1993, always indicating that his date of birth was October 3, 1931, undercuts the credibility of his testimony to the contrary. In addition, plaintiff's testimony was inconsistent with other statements he made during the administrative proceedings. Plaintiff alleges that when he left China and relocated to

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[2] Plaintiff contends that because he is a naturalized citizen and his naturalization certificate indicates a date of birth in 1923, defendant and this Court are required to accept it. Plaintiff's naturalization certificate, which was issued by this Court does reflect a date of birth in 1923. [AR 107]. There is no evidence in the record, however, regarding the basis on which that date was selected, the evidence presented both in support of and in opposition to the selection of that date, whether plaintiff's date of birth was disputed, and the like. Accordingly, there appears to be no basis for application of principles akin to res judicata or collateral estoppel. Plaintiff has presented no authority indicating that any such principle would apply. Indeed, defendant's regulations indicate that a naturalization certificate is just one of many types of evidence that defendant may consider if preferred evidence is not available. *See* 20 C.F.R. § 404.716(b). Therefore, defendant was not bound by plaintiff's date of birth as reflected in plaintiff's naturalization certificate.

Hong Kong, he told the government clerk his correct date of birth but that the clerk made a mistake and incorrectly recorded his date of birth as October 3, 1931. [AR 39]. Earlier, plaintiff had said that when he relocated to Hong Kong, he purposefully provided Hong Kong authorities with an incorrect date of birth so that he would appear to be younger and have a better chance of obtaining employment. [AR 90]. Although plaintiff attempted to explain away these inconsistencies, it is within the province of defendant to assess the persuasiveness of that explanation. The ALJ did not find plaintiff's explanation credible. [AR 21].

Defendant further was entitled to give little or no weight to statements of plaintiff's in-laws. Although defendant may not arbitrarily discounted [sic] the testimony of lay witnesses, *see, e.g. Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996) (requiring the ALJ to "give reasons that are germane to each witness" for rejecting the testimony of lay witnesses as to matters about which they are competent to testify), here there was ample reason to discount it. The statements of plaintiff's in-laws do not establish that they possess personal knowledge regarding the date of plaintiff's birth. [AR 91-92]. Accordingly, defendant was entitled to disregard them.]*See* AR 22].

Plaintiff also argues that the ALJ erred in denying plaintiff's request to cross-examine Ms. Ho, the Chinese translator of one of the documents in the record, regarding her general statement that a notarized document received from China is unreliable because the person can report any date of birth to government officials and they will simply accept it. [*See* AR 112]. There is no indication

that defendant relied on that general statement in reaching its decision. Plaintiff's reliance on *Solis v. Schweiker*, 719 F.2d 301 (9th Cir. 1983) is misplaced because in that case the physician whom the plaintiff had sought to cross-examine was a "crucial witness". *See Solis*, 719 F.2d at 302. Here, by contrast, Ms. Ho's general statement may not have been considered at all, or may have been considered only in light of plaintiff's argument to the ALJ that it possessed minimal probative value. [*See* AR 33-34]. In any event, Ms. Ho's general statement added little or nothing to the evidence of record and there is no reason to believe that if she had been cross-examined or if her general statement had been stricken from the record, defendant's decision would have been any different than it was.

Recommendation

For the foregoing reasons, it is recommended that the Court issue an order adopting this report and recommendation, granting defendant's motion for summary judgment, denying plaintiff's motion for summary judgment, and directing that judgment be entered affirming the decision of defendant.

DATED: 10-29-98

/s/ Andrew J. Wistrich
ANDREW J. WISTRICH
United States Magistrate Judge

(LOGO)
DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration

Refer to: 569-94-4888

Office of Hearings and Appeals
150 S. Los Robles Ave., #500
Pasadena, CA 91101
Telephone: (818) 793-1121
Date: October 4, 1996

NOTICE OF DECISION – UNFAVORABLE

Wei M. Lee
1649 E. Maple Street
Pasadena, CA 91106

I have made the enclosed decision in your case. Please read this notice and the decision carefully.

If You Disagree With The Decision

If you do not agree with my decision, you may file an appeal with the Appeals Council.

How To File An Appeal

To file an appeal you or your representative must request the Appeals Council to review the decision. You must make the request in writing. You may use our Request for Review form, HA-520, or write a letter.

You may file your request at any local Social Security office or a hearing office. You may also mail your request right to the Appeals Council, Office of Hearings and Appeals, 5107 Leesburg Pike, Falls Church, VA 22041-3255. Please put

the Social Security number shown above on any appeal you file.

Time To File An Appeal

To file an appeal, you must file your request for review **within 60 days** from the date you get this notice.

The Appeals Council assumes you got the notice 5 days after the date shown above unless you show you did not get it within the 5-day period. The Council will dismiss a late request unless you show you had a good reason for not filing it on time.

Time To Submit New Evidence

You should submit any new evidence you wish to the Appeals Council to consider **with** your request for review.

How An Appeal Works

Our regulations state the rules the Appeals Council applies to decide whether to review a case and in reviewing a case. These rules appear in the Code of Federal Regulations, Title 20, Chapter III, Part 416, Subpart N.

If you file an appeal, the Council will consider all of my decision, even the parts with which you may agree. The Council **will** review your case if one of the reasons for review listed in our regulations exists. Section 416.1470 of the regulations lists these reasons.

Requesting review places the entire record of your case before the Council. Review can make any part of my decision fully or partially favorable or unfavorable to you.

On review, the Council may itself consider the issues and decide your case. The Council may also send it back to an Administrative Law Judge for a new decision.

The Appeals Council Can Review The Decision On Its Own Motion

The Appeals Council can review my decision even if you do not ask it to do so. If it decides to do that, the Council will mail you a notice about its review within 60 days from the date of this notice.

If No Appeal And No Review On The Appeals Council's Own Motion

If you do not appeal and the Council does not review my decision on its own motion, you will not have a right to court review. My decision will be a final decision that can be changed only under special rules.

New Application

You have the right to file a new application at any time, but filing a new application is not the same as appealing this decision. If you disagree with my decision and you file a new application instead of appealing, you might lose some benefits, or not qualify for any benefits. So, if you disagree with this decision, you should file an appeal within 60 days.

Your Right To Representation In An Appeal

You may have a lawyer or other person help you in any appeal you file with the Appeals Council. There are groups that can help you find a lawyer or give you free legal services if you qualify. There are also lawyers who do not charge unless you win your appeal. Your local Social Security office has a list of groups that. can help you with an appeal.

If you get someone to help you with an appeal, you or that person should let the Appeals Council know. If you hire someone, we must approve the fee before he or she can collect it.

Do You Have Any Questions?

If you have any questions, you may call, write or visit any Social Security office. If you visit an office, please bring this notice and decision with you. The telephone number of the local office that serves your area is 818-796-2542. Its address is 104 N. Mentor, Pasadena, CA 91106.

cc: Stephanie Simpson
Attorney at Law
11743 Seminole Circle
Northridge, CA 91326

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF	CLAIM FOR
Wei M. Lee (Claimant)	Retirement Insurance Benefits
_____ (Wage Earner)	569-94-4888 (Social Security Number)

This case is before me on a Remand by the Appeals Council. By order dated June 11, 1996, the Appeals Council vacated my dismissal dated June 19, 1995, and remanded the case to me for further proceedings. In the remand order, the Administrative Appeals Judges advised me to take any further action needed to complete the administrative record. I held a hearing on August 15, 1996 in Pasadena, California. Stephanie Simpson, attorney at law, represented the claimant who appeared and testified through a Cantonese interpreter.

ISSUE

The issue before me is the claimant's date of birth.

STATEMENT OF THE CASE

The claimant applied for retirement insurance benefits on October 5, 1994, alleging that he was born on October 3,

1923. His claim was denied initially and on reconsideration as he had not yet attained age 62, early retirement age. The claimant had earlier applied for retirement insurance benefits on January 15, 1993. He had alleged October 3, 1923 as his date of birth at that time, and his claim was denied.

The evidence of record relative to the claimant's date of birth is as follows:

1) A Chinese certificate notarized on September 24, 1991 which does not show the date or source of the record but gives a date of birth of October 3, 1923 (Exhibit 16).

2) A Certificate of Naturalization dated September 25, 1992 showing October 3, 1923, as date of birth (Exhibit 17).

3) A Numident printout which shows the date of birth that the claimant gave when he applied for his Social Security number in October 1969. At that time he gave a date of birth of October 3, 1931 (Exhibit 18).

4) A Verification Report from the Immigration and Naturalization Service dated October 30, 1969 showing eligibility "lawful permanent resident-employment authorized," showing October 3, 1931 as date of birth.

5) California driver's license issued September 17, 1981, showing date of birth October 3, 1931 (Exhibit 2).

6) A delayed birth certificate showing October 3, 1923, recorded on October 27, 1987 (Exhibit 41).

In a statement dated September 28, 1993, the claimant said that when he migrated to Hong Kong, he used a later

date of birth in order to secure employment. He continued to use that birth date when he came to the United States (Exhibit 11).

In a statement dated October 25, 1993, the claimant's mother-in-law said that when the claimant went to Hong Kong to seek employment, he reported a younger age in order to "land a job" (Exhibit 12). The claimant's father-in-law, repeated his wife's statement.

At the hearing, the claimant testified that he went to Hong Kong because of the war. The claimant insisted that he gave his correct year of birth. According to the claimant, the clerk in Hong Kong wrote the wrong year. He came to the United States in 1969, but maintained the incorrect year of birth. He did not decide to change his date of birth until he was ready to apply for citizenship. In 1987, he began the process to change his date of birth. He secured his citizenship in 1992. I asked the claimant why, after decades, it became important to him to "correct" his date of birth, and he said that he wanted to have his correct birth date on his citizenship papers.

The claimant's representative speculated that the claimant told the clerk in Hong Kong that he was born in the Chang Kai Shek year twelve which, in the western calendar, was 1923. The clerk, however, made an error and recorded the year as twenty, which, in the calendar, is 1931. According to Ms. Simpson the claimant had difficulties obtaining his "birth certificate" and finally secured it from his home province in China. She argued that the 1991 certificate had been accepted by the United

States District Court Judge in the naturalization proceedings and that therefore it should be accepted by the Social Security Administration.

The claimant has given inconsistent explanations for the 1931 birth date. On a formal statement to the Social Security Administration executed on September 28, 1993, the claimant said that when he migrated to Hong Kong, he tried to make himself appear younger in order to secure employment; he therefore used an incorrect date of birth (Exhibit 11). His mother-in-law and father-in-law both confirmed that explanation (Exhibits 12 and 13). It was not until the hearing that the claimant and his representative claimed that the error was made by a confused bureaucrat in Hong Kong. These inconsistent explanations of the 1931 birth date significantly reduce the claimant's credibility.

The claimant's credibility is further diminished by the fact that he testified that he waited until 1991 or 1992 to apply for citizenship because he understood that after so many years in the United States, and after achieving the age of 60, he could apply in his native language and did not have to study English. If he was born in 1923 as he now alleges, he attained age 60 in 1983 and could have applied for citizenship about a decade before he did.

After applying for citizenship and alleging 1923 as his year of birth for immigration purposes, the claimant renewed his California driver's license on September 8, 1993. He continued to report October 3, 1931 as his date of birth (Exhibit 40). The claimant attempted to explain at the hearing that he did not know he could change his year of birth on his driver's license, but this does not

make sense. He succeeded in changing a date of birth that he had used for decades for Immigration and Naturalization purposes. I cannot fathom why he anticipated tremendous obstacles from the State of California; he could easily have changed his date of birth on his driver's license.

I find that the claimant was born on October 3, 1931. This conclusion is based on the earliest recorded evidence, the claimant's Social Security record, which was established on October 1969 (Exhibit 18), his original Immigration and Naturalization Service document of October 30, 1969 (Exhibit 18), and his original California Driver's License which was secured on September 17, 1981. The Chinese notarial certificate was not notarized until September 24, 1991 (Exhibit 16) and his certificate of naturalization, also bearing a date of birth of October 3, 1923, was completed on September 25, 1992 (Exhibit 17). These two documents carry very little weight in the face of the documents which were recorded so much earlier. The delayed birth certificate of 1987 is also a relatively new document compared to the three older documents. Social Security Ruling 75-14a explains that the highest probative value is assigned to the documents recorded earliest moreover, statements or affidavits of others are given lesser weight even when those others might have been present at the time of the event. In this case, the claimant's mother-in-law and father-in-law do not allege that they were present at the claimant's birth.

I find that the evidence supports a date of birth of October 3, 1931. I therefore conclude that the claimant was born on October 3, 1931.

FINDINGS

After careful consideration of the entire record, I make the following findings:

1. The claimant applied for Retirement Insurance Benefits on October 5, 1994.

2. The claimant was born October 3, 1931.

3. The claimant attained age 62 on October 3, 1993.

DECISION

I decide that, pursuant to his application filed on October 5, 1994, the claimant is entitled to retirement insurance benefits based on the date of birth of October 3, 1931.

/s/ Richard A. Urbin
Richard A. Urbin
Administrative law Judge

September 27, 1996
Date

Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WEI M. LEE,	*	No. 99-55048
Plaintiff-Appellant,	*	D.C. No.
v.	*	CV-98-01110-DT(AJW)
KENNETH S. APFEL, Commissioner of Social Security Administration,	*	**ORDER**
Defendant-Appellee.	*	(Filed Sep. 6, 2000)

Before: **KOZINSKI, T.G. NELSON** and **WARDLAW**, Circuit Judges.

The petition for rehearing is denied. The full court has been advised of the petition for rehearing en banc and, no active judge having requested a vote thereon, the petition is denied. Fed. R. App. P. 35.

公　　证　　书

中华人民共和国广东省台山县公证处

公　证　书

（91）合证字第40243号

兹证明李伟谋，男，于一九二三年十月三日在广东省台山县出生。李伟谋的父亲是李圣煜，李伟谋的母亲是陈美容。

中华人民共和国广东省台山县公证处

公证员：

一九九一年九月二十四日

台山县公证处

App. 26

NOTARIAL CERTIFICATE (TRANSLATION)
(91) Tai Zheng Zi, No.40243

This is to certify that Li Weimou (Lee Wie Mou, male) was born on Oct. 3, 1923 at Taishan County, Guangdong Province. His father is Li Shenghuang and his mother is Chen Meirong.

Taishan Notary Public Office
Guangdong Province
The People's Republic of China
Notary: Li Jinlu
Sept. 24, 1991

公　证　书

(91) 台证字第40244号

兹证明前面的英文译本与中文内容相符。

中华人民共和国广东省台山县公证处

公证员：

一九九一年九月二十四日

App. 27

UNITED STATES OF AMERICA

CERTIFICATE OF NATURALIZATION

No. 20134200

Personal description of holder as of date of naturalization:

Date of birth: OCTOBER 03, 1923

Sex: MALE

Height: 5 *feet* 6 *inches*

Marital status: MARRIED

Country of former nationality:

CHINA, MAINLAND

I.N.S. Registration No. A19 094 873

I certify that the description given is true, and that the photograph affixed hereto is a likeness of me.

Wei Mou Lee

(Complete and true signature of holder)

Be it known that, pursuant to an application filed with the Attorney General at: LOS ANGELES, CA

The Attorney General having found that:

WIE MOU LEE

then residing in the United States, intends to reside in the United States when so required by the Naturalization Laws of the United States, and had in all other respects complied with the applicable provisions of such naturalization laws and was entitled to be admitted to citizenship, such person having taken the oath of allegiance in a ceremony conducted by the

U.S. DISTRICT COURT
FOR THE CENTRAL DIST. OF CALIFORNIA

at: LOS ANGELES, CA *on:* SEPTEMBER 25, 1992

that such person is admitted as a citizen of the United States of America.

Gene McNary

Commissioner of Immigration and Naturalization

IT IS PUNISHABLE BY U. S. LAW TO COPY, PRINT OR PHOTOGRAPH THIS CERTIFICATE, WITHOUT LAWFUL AUTHORITY.

DEPARTMENT OF JUSTICE

FORM N-550 REV. 6-91

BEST AVAILABLE COPY